88- 1757

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

THE UNITED STATES,

Respondent,

v.

ALFRED D. COVATTO,

Petitioner.

WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the prejudice resulting from the prosecutor's misconduct at trial prevent the Petitioner from receiving a fair trial, and did the Court of Appeals properly analyze the extent of the prejudice?

2. Did the Court of Appeals err in affirming the trial court's admission into evidence of unfairly prejudicial evidence pertaining to matters which occurred after the crimes charged in the indictment?

3. Did the Court of Appeals err in affirming the trial court's ruling that the government produced sufficient evidence to support the conviction of the Petitioner?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the Opinion and Order of the United States Court of Appeals for the Third Circuit, entered on January 26, 1989.

## OPINIONS BELOW

Alfred D. and Joyce M. Covatto were convicted after a trial by jury on June 15, 1988. The convictions were affirmed by the Third Circuit Court of Appeals in an unpublished opinion issued on January 26, 1989, which is set forth in the Appendix at A-1. The Covattos' Petitions for Rehearing In Banc were denied without a written opinion (A-23).

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Third Circuit's opinion was issued on January 26, 1989 and the Court denied Mr. Covatto's Petition for Rehearing In Banc on February 21, 1989.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the fifth amendment to the United States Constitution states in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

18 U.S.C. § 656 states:

> **Theft, embezzlement, or misapplication by bank officer or employee**
>
> Whoever, being an officer,

director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company,

savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U.S.C. § 1344 states:

**Bank fraud**

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or insured financial institution" means--

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

18 U.S.C. § 2 states:

**Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would

> be an offense against the United States, is punishable as a principal.

## STATEMENT OF THE CASE

Alfred and Joyce Covatto were indicted in April 1987 by a federal grand jury in the Western District of Pennsylvania in a 49-count indictment alleging violations of 18 U.S.C. §§ 656, 1344, and 2. Their first trial resulted in a mistrial because the jury was unable to reach a verdict. The second trial, which took place in June 1988, resulted in verdicts of not guilty on four counts and verdicts of guilty on all remaining counts submitted to the jury.

The events which precipitated the criminal prosecution in this case stemmed from the purchase in January 1985 of National Bancorporation ("NBC") by a bank known initially

as First National Bank of Fryburg and later renamed First United National Bank ("FUNB"). Testimony at trial established that NBC was a corporation engaged in the business of marketing and servicing bank services, such as loans and credit card accounts, for major banks in Pennsylvania and elsewhere. Because of its success, it was the object of several purchase attempts, first in 1982 when Richard Dowling sought to buy NBC on behalf of a group of investors from Titusville, Pennsylvania, and later in 1983-84 when Dowling negotiated the buy-out of NBC on behalf of FUNB, of which he was then chief executive officer. The purchase transaction was completed in January of 1984, at which time the stock of NBC was purchased by FUNB, and a buy-out agreement was signed.

Alfred and Joyce Covatto were key fig-

ures in the operation of NBC both before and after its purchase by FUNB. Prior to the sale, Mr. Covatto was a controlling stockholder and CEO of NBC, and he remained the CEO after the purchase. Joyce Covatto, Alfred Covatto's wife, was at all pertinent times the head of the telemarketing division of NBC.

The charges against the Covattos in this case arose from events which took place after the sale of NBC to FUNB. In the indictment and at trial, the government alleged essentially three separate areas of criminal activity by the Covattos. First, the government charged that Mr. Covatto fraudulently took 11 checks from various NBC accounts for his personal use, without having any valid authority to do so. Second, the government alleged that Mr. Covatto authorized the pro-

vision of child care for the Covatto children, so that Joyce Covatto could continue working at NBC, without the permission of the FUNB board of directors. Third, the government claimed that the Covattos issued, or caused the issuance of, false and fraudulent invoices to Marine Midland Bank for work which was never authorized and thereby illegally obtained money from FUNB.

The testimony presented by the government at trial was all circumstantial with regard to the allegations of fraud; no witness testified to the effect that he or she had direct knowledge of any fraudulent scheme on the part of the Covattos. Instead, the government introduced evidence concerning the circumstances of the various transactions at issue and invited the jury to infer the intent to defraud from these circumstances.

The Covattos, on the other hand, denied any fraudulent intent and relied on the defense of good faith, arguing that the withdrawal of funds by checks and the child care payments were all done with no attempt to conceal them and were in fact valid payments of accrued compensation and employee benefits, respectively. With regard to the invoice issue, the Covattos testified as to the likely basis for the invoices and explained that they were unable to provide direct documentation of the charges when asked because of an inability to research files which were in the custody of FUNB and were later presumably destroyed.

A more detailed examination of the facts is necessary for a full understanding of the issues before this Court. The evidence at trial showed that at the time of the purchase of NBC, Alfred Covatto had accrued $48,000 of

compensation from NBC which he had not yet taken. This accrued compensation was acknowledged in the buy-sell agreement and in statements made by Dowling to Covatto. Indeed, at the time of the closing on the sale, Covatto was paid $10,000 against this accrued compensation, with the understanding that he would receive the remainder in the future. The government alleged in its case that in April of 1984 Covatto voluntarily, unilaterally and unequivocally gave up his right to the remaining $38,000 in a meeting with the FUNB board of directors. However, the government's own evidence demonstrated that the board took no official action on this alleged unilateral promise and gave no consideration to Covatto in exchange for it. Covatto and other witnesses testified, on the other hand, that Covatto merely offered to postpone col-

lection of the funds owed to him as an indication of how much he wanted to make the "marriage" between FUNB and NBC a success. Covatto and others further testified that in a FUNB shareholders' meeting in May 1984, after portions of the purchase agreement were violated by FUNB, Covatto announced to Dowling that he would begin drawing against his accrued compensation as the funds became available.

Against this background, the government introduced physical evidence of 11 checks made out to Alfred Covatto and others in the period between March 1984 and June 1985. The government also introduced testimony, over the objection of the Covattos, from numerous witnesses to explain the uses to which some of the funds had been put. This evidence consisted largely of testimony which implied

that the Covattos had bribed an influential employee of Marine Midland Bank in order to maintain business with Marine Midland. Covatto freely admitted having taken the funds in question, but indicated that at all times he believed that he was entitled to the funds as payments of accrued compensation. Documentation of the transactions, reflecting a contemporaneous accounting of the payments in the books of NBC, was introduced.

The government's evidence on the counts relating to the payment of the child care benefits took the form of testimony from the Covatto's babysitter to the effect that she was paid by NBC and that on certain occasions she had conversations with Mr. or Mrs. Covatto which implied that she was listed on the payroll of NBC as something other than a babysitter. The prosecution also introduced

testimony from a FUNB director who stated that he was unaware of the child care benefits. The Covattos, on the other hand, demonstrated that the benefit had been approved and effectuated by NBC directors prior to the buy-out, and had merely continued thereafter as a valid employee benefit offered within the discretion of the CEO of NBC.

With regard to the three allegedly fraudulent invoices, the government's evidence was particularly circumstantial. After introducing copies of the invoices, the prosecutor elicited testimony from several witnesses who indicated that Marine Midland Bank had never paid the invoices and that documentation for the invoices could not be located. The government witnesses also established that the invoices had been paid by FUNB funds by virtue of an accounting system under which

NBC was immediately reimbursed for such invoices, after which FUNB would be paid by Marine Midland Bank. Finally, the prosecution presented testimony to the effect that the Covattos had never produced adequate documentation to explain the invoices. The government never produced any testimony indicating that the Covattos had personally created or issued the invoices.

In their defense, the Covattos showed that the reimbursement system underlying the invoice problem was created by Richard Dowling, the CEO of FUNB, as a means of improving cash flow for NBC because Marine Midland Bank had been slow in paying invoices. Moreover, the Covattos testified that the first invoice in question was for an advance on a large telemarketing project, and thus would be accompanied by no documentation since it was,

by definition, for work which had not yet been performed at the time. Evidence was supplied to show that such advances were not uncommon and that similar advances had been paid previously. With regard to the two remaining invoices, the Covattos presented testimony as to what projects were covered by these invoices and that, by the time the failure of Marine Midland Bank to make payment had been made known to the Covattos, the Covattos had already been terminated and all efforts to reconstruct documentation for the invoices were made impossible by the condition of the records, which were in the custody of FUNB.

In short, the Covattos consistently maintained that they had never intended to defraud FUNB, and that the criminal charges against them were simply an outgrowth of an

unsuccessful business venture which had not turned out as well as FUNB had hoped. Because of losses suffered by FUNB, Richard Dowling and others at FUNB turned to the Covattos as scapegoats for the financial performances of NBC and FUNB after the purchase. The Covattos' trial was marked by a number of incidents of prosecutorial misconduct, including numerous misstatements of evidence before the jury and one incident in which the prosecutor, in questioning a witness, disobeyed the direct ruling of the trial court with regard to the scope of questioning of the witness. These incidents formed one basis of the Covattos' appeal to the Third Circuit. In addition, the Covattos contended that the Assistant United States Attorney's conduct at trial constituted prosecutorial misconduct requiring reversal of their con-

victions, and that the admission of irrelevant and unfairly prejudicial testimony regarding the ultimate disposition of the funds admittedly taken by Alfred Covatto denied the Covattos a fair trial. Finally, the Covattos also argued that the evidence was insufficient to support the guilty verdicts on any of the three theories of fraud.

In a brief memorandum opinion, the Third Circuit rejected the Covattos' appeal. With regard to the prosecutorial misconduct issue, the court recognized the prosecutor's "careless" and "less than praiseworthy" conduct, but declined to hold that it was "sufficiently prejudicial" to require reversal. Significantly, the court gave no reasoning to explain its conclusion that the misconduct, while prejudicial, was not sufficiently prejudicial to require a new trial. The court

also held, without responding to the points raised in the Covattos' briefs, that there was sufficient evidence to support the convictions, and that the trial court had not erred in admitting the contested evidence.

## REASONS FOR GRANTING THE WRIT

### I. THE PROSECUTOR'S MISCONDUCT DEPRIVED PETITIONER OF A FAIR TRIAL, AND THE COURT OF APPEALS FAILED TO ANALYZE PROPERLY THE EXTENT OF THE PREJUDICE.

Over 50 years ago, this Court conclusively established the principle that a prosecuting attorney must conduct himself at trial in a manner which serves not only the goal of conviction, but also serves the preeminent goal that justice is to be done. In Berger v. United States, 295 U.S. 78, 88 (1935), the Supreme Court stated:

> The United States Attorney is the representative not of an ordi-

> nary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

On the basis of this rule, the Court in Berger reversed the conviction of the defendant because the prosecuting attorney had "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. . . ." Berger, 295 U.S. at 84. This conclusion was based in large

part on the fact that the prosecutor had misstated facts and testimony in the course of his examination of witnesses and his arguments. Because the misconduct of the prosecuting attorney was not slight or confined to a single instance, but instead was "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential," a new trial was ordered. Id. at 89.

Since Berger, this Court has on several occasions addressed issues of prosecutorial misconduct which took place during the course of a trial, and in each case it has reaffirmed the general principles set forth in Berger. See, e.g., United States v. Young, 470 U.S. 1 (1985); Smith v. Phillips, 455 U.S. 209 (1982); Singer v. United States, 380 U.S. 24 (1965); United States v. Socony-Vacuum Oil

Co., 310 U.S. 150 (1940). Thus, it is clear that this Court will not tolerate conduct of a United States Attorney which is designed to gain an unfair advantage over a defendant.

Despite this Court's commitment to repudiate wrongful methods of prosecutors, the Court has yet to enunciate a uniform standard by which to judge when a prosecutor's misconduct is sufficiently prejudicial to require a new trial. While it is apparent that a defendant is entitled to a new trial when his right to a fair trial has been violated, Berger, 295 U.S. at 89, the Court has not adopted a sufficiently specific test for lower courts to use in evaluating whether a fair trial has been denied under particular circumstances. Thus, while trial and appellate courts are often faced with situations in which prosecutors are alleged to have engaged

in conduct which goes beyond the bounds of the Berger principles, the decisions reflect various methods of resolving the issue. Some courts of appeal have devised a four-part test which calls for a careful weighing of both the prosecutorial misconduct at issue as well as the particular facts of the case. See United States v. Harrison, 716 F.2d 1050 (4th Cir.), cert. denied, 466 U.S. 972 (1983); United States v. Leon, 534 F.2d 667 (6th Cir. 1976). These courts examine (1) the degree to which the prosecutor's statements had a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert

attention to extraneous matters.

Other courts, however, in the absence of meaningful guidelines for the resolution of prosecutorial misconduct issues, appear to gloss over significant prejudicial actions of United States Attorneys without a careful analysis of their damaging effect. This case presents one such situation.

Even a cursory review of the many examples of prosecutorial misconduct in this case reveals that there were blatant mischaracterizations of evidence and improper questions, arguments, and comments by the Assistant United States Attorney throughout the trial. The tone of the trial was set early when, in the prosecutor's opening remarks, he continually stated that allegedly misappropriated funds went directly into the Covattos' bank accounts. When defense counsel

objected, the trial court sustained the objection and directed the prosecutor to correct his misstatements. The prosecutor then did so, but he still could not resist making a further prejudicial remark as he stated:

> I referred to the $150,000 going into the Covattos' accounts. Specifically what I meant is it went into NBC and the subsidiaries that were controlled directly by Al Covatto and Joyce Covatto. I did not mean to imply that it went into their Swiss bank account[.]

(Tr. at 137). Of course, the prosecutor knew that the Covattos had no Swiss bank account, and there was no evidence presented that such an account existed. The prosecutor made his comment solely to taint the jury's impression of the Covattos by implying that they had a secret account in which they stored large amounts of improperly acquired funds.

Later, while presenting his evidence, the prosecutor disobeyed the explicit ruling

of the trial court regarding the scope of questioning of one witness, which prompted defense counsel to move for a mistrial and resulted in a recess for consideration of the motion. The witness was an employee of the Comptroller of Currency, and the prosecutor wanted to elicit testimony from him to the effect that he had investigated FUNB and had determined that criminal charges should be brought against the Covattos. The trial judge ruled in a side bar conference that such testimony was not relevant, and that a question regarding the referral of the investigation to other authorities should not be asked, but the prosecutor nevertheless asked the witness: "[W]ould it be fair to say that based upon your examination, you referred the matter to the authorities?" (Tr. at 536). Although the trial judge criticized the

prosecutor at a subsequent side bar conference (Tr. at 544), the Covattos remained prejudiced by the obvious implications of the prosecutor's improper question.

In another attempt to improperly and unfairly strengthen the government's case, the prosecutor filled his closing argument with misstatements of the evidence presented at trial. Time after time, the prosecutor attempted to sway the jury by referring back to statements made by witnesses at trial, only to put words in the mouths of witnesses who had not actually said what was claimed, or to modify testimony in order to make it more damaging to the Covattos. Several examples from the transcript indicate the type of persistent misstatements involved.

First, in his closing argument to the jury the prosecutor stated that the evidence

showed that prior to the purchase of NBC by FUNB, NBC was a "struggling business" and because of this Mr. Covatto was "looking for somebody to buy him out" (Tr. at 1121). No evidence supported this claim, however, and in fact the uncontested evidence demonstrated that Dowling had on two occasions approached Covatto about buying NBC because of the company's past success and future potential for growth (Tr. at 763-764; 1035). The prosecutor was clearly attempting to strengthen his theory of the case--which was that Covatto was a big-city slicker who had before the sale of NBC set out to take advantage of the small-town FUNB people (Tr. at 126)--by mischaracterizing the evidence to create the impression that Covatto had lured FUNB into its involvement with NBC, when in fact the purchase of NBC by FUNB was initiated by

Dowling, the CEO of FUNB.

A second example of blatant misstatement of evidence occurred when the prosecutor alleged in his closing argument that Mr. Covatto had been terminated from his position as CEO of NBC because the directors at FUNB had "figured out" the Covattos' scheme with regard to the invoices (Tr. at 112). However, no witness so testified at trial; the only testimony before the jury regarding Covatto's termination was the testimony of Covatto himself, who stated that his resignation was requested because of alleged poor financial performance of NBC, and that he refused to resign on the terms requested by FUNB (Tr. at 842-44).

Yet another example demonstrates the extremes to which the prosecutor went in attempting to ridicule the credibility of the

Covattos. At one point, Joyce Covatto testified that NBC would generate 1,500 new credit card accounts per day in a large telemarketing program. The 1,500 figure was used twice by Mrs. Covatto in her testimony (Tr. at 962; 969). In argument before the jury, however, the prosecutor unfairly and intentionally confused the jury regarding her actual testimony by purposely exaggerating the figure:

> Joyce said that she was involved in the Prime Diamond project and they were going to 15,000 accounts per day. I wrote that down, and I thought, 15,000 accounts per day, if I'm right in my math, and I think that I am, because I have checked it twice, 15,000 accounts per day adds up to $97,000 per day generated at $6.50 per hour. If you take that one step further, even if they ran this for one year, they would make $35,597,000.
>
> Now that is typical of what both Covattos have done in this case when they go up onto the stand and they testified. They found whatev-

> er way they could, instead of answering the question, to divert or excuse or try or make it sound like this was a huge operation, and who could possibly question a meager $151,000.

(Tr. at 1207-08). Clearly, the prosecutor's comments can only be characterized as a deliberate attempt to mislead the jury on the crucial issue of the credibility of the Covattos.

These examples are only a few of the numerous similar attempts by the prosecutor to distort the testimony of witnesses. As was noted by the Court in Berger, "[i]t is impossible . . . without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct." 295 U.S. at 85. Clearly, the statements were "purposeful" and "flagrant," Singer, 380 U.S. at 38,

and cannot be characterized as merely "incidental statements" during a long trial which otherwise produced strong evidence against the defendants. See Socony-Vacuum, 310 U.S. at 239.

Moreover, in addition to this distortion of evidence, the prosecutor also unfairly and persistently overemphasized prejudicial testimony concerning alleged commercial bribery on the part of the Covattos. As is discussed in Section II, infra, the admission of such evidence was unfairly prejudicial in light of the fact that it was not probative of any of the elements of the crimes at issue. Thus, the trial court's decision to permit the introduction of such evidence was violative of Fed. R. Evid. 403. Even more unfair, however, was the prosecutor's overemphasis of such evidence--to the extent that witnesses who

had no knowledge of the events which formed the basis of the indictment were called solely to buttress the bribery allegations--and his continued references to the unrelated allegations in his opening and closing arguments.

For example, in his opening argument the prosecutor stated at length that the evidence would tend to show that Mr. Covatto used money from the allegedly misapplied funds to bribe James Willman at Marine Midland Bank into continuing that bank's working relationship with NBC. He then spent literally hours of the trial questioning various witnesses about the relationship between Willman and Covatto, with the obvious intent of using this testimony to depict Covatto as a bad person. Just as damaging was the prosecutor's continued success at side bar conferen-

ces in speaking so loudly regarding his theory of commercial bribery that the jury clearly overheard. For example, in making his offer of proof regarding David Kuczkowski, an employee of Marine Midland who had no connection to the charges against the Covattos, the prosecutor on several occasions was warned against speaking so the jury could overhear him, but he continued to do so and loudly referred to Covatto's "greasing the wheels" for Willman (Tr. at 483). While the decision of the Court of Appeals concluded that it could not discern from the record that the jury overheard the prosecutor's comments at sidebar conferences, this conclusion is refuted by close examination of the transcript. At one point, the prosecutor was told by a court official that his words could be heard "pretty clearly" at the jury

box (Tr. at 560-61).

In his closing argument the prosecutor repeatedly emphasized the uses to which Covatto put the funds taken against his accrued compensation. The net effect of the persistent references to irrelevant material and the insinuations drawn therefrom it was that the jury was likely to convict Covatto as much for what he did with the funds which he took as for whether he had taken them without authority. That this undoubtedly occurred is proven by the fact that the jury did in fact acquit Covatto on all but one of the counts relating to checks payable to Covatto himself, but convicted on all of the counts involving checks payable to others. Since the sole legal issue on these charges was Covatto's entitlement to the funds--and not what he did with them--this Court must con-

clude that the prosecutor's repeated references to the bribery theory did in fact prejudice Covatto.

The Court of Appeals appeared to excuse the many examples of prosecutorial misstatements by the observation that the prosecutor and the Court had informed the jury that the prosecutor's comments were not evidence. However, as this Court emphasized in Berger, 295 U.S. at 88, the average jury has confidence that the prosecutor will uphold his duty to be fair, and therefore when the prosecutor makes "improper suggestions" and "insinuations" they "are apt to carry much weight against the accused when they should properly carry none." Thus, despite the two or three general statements made by the prosecutor and the court as to recollections of the evidence, the many misstatements which

had taken place in the trial, clearly must have carried more weight than was proper.

The Court of Appeals' decision did not reflect a careful analysis of the totality of the circumstances with regard to the prosecutorial misconduct. Had the court used the four-part test adopted by the Fourth and Sixth Circuits, see Harrison, 716 F.2d at 1052, Leon, 534 F.2d at 679, it would have reached a different result. A fair review of the entire transcript of the trial can only lead to the conclusion that all four of these factors weigh in favor of the Covattos' contention that their right to a fair trial was undermined by the conduct of the prosecutor. The weakness of the government's case was evidenced by the prior hung jury and by the subsequent acquittal of Alfred Covatto on certain counts. Finally, it was clear from

the pattern of comments and from the sheer number of misstatements of evidence that the prosecutor deliberately placed prejudicial matters before the jury. The Court of Appeals' failure to give due consideration to each of these factors renders suspect its conclusion that a fair trial was conducted despite the extensive prosecutorial misconduct which occurred.

This case, therefore, gives the Court an opportunity not merely to correct an injustice and to once again reaffirm its commitment to the principles set forth in Berger, but also to provide the courts of appeals with a consistent set of guidelines for evaluating claims of prosecutorial misconduct, which will result in both more consistent adjudications and heightened perceptions of fairness in the review of prosecutorial mis-

conduct. The Petitioner respectfully requests that this Court adopt the four-part test used in Harrison and Leon, and mandate its usage in resolving prosecutorial misconduct issues in federal cases.

II. THE TRIAL JUDGE ERRED IN PERMITTING THE GOVERNMENT TO INTRODUCE UNFAIRLY PREJUDICIAL EVIDENCE.

Federal Rule of Evidence 402 mandates that only relevant evidence be introduced in criminal prosecutions and other trials. As defined in Rule 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

This restriction on the admission of evidence stems from the clear necessity of ensuring that a defendant is judged solely on the

basis of the charges against him, and not on the basis of extraneous matters. As was recently stated by one court, "[i]t is imperative that a criminal jury consider only those things that directly relate to the guilt or innocence of the accused as charged in the indictment." United States v. Sutton, 801 F.2d 1346, 1360 (D.C. Cir. 1986) (emphasis added).

Moreover, the rules recognize that evidence which may have some relevance to the crime charged may still be inadmissible if its prejudicial effect outweighs its probative value. Rule 403 states in part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .

See Huddleston v. United States, 108 S. Ct. 1496, 1502 (1988) (protection against unfair

prejudice emanates in part from the assessment the trial court must make under Rule 403 to determine whether the probative value of similar acts evidence is substantially outweighed by its potential for unfair prejudice). In determining what constitutes unduly prejudicial evidence, courts must examine whether the evidence is genuinely needed to prove the elements of the crime and whether the introduction of the evidence constitutes a risk that the jury will convict on improper grounds. United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir.), cert. denied, 109 S. Ct. 263 (1988); United States v. Cook, 538 F.2d 1000, 1003 (3d Cir. 1976).

In this case, it is abundantly clear that the trial court erred in admitting certain evidence, and the Court of Appeals did not undertake a careful review of the issue.

The Covattos were charged with violations of three statutory sections, 18 U.S.C. §§ 656, 1344, and 2, with regard to 11 checks drawn against accounts of NBC. The government's theory with regard to these checks was that Alfred Covatto misapplied bank funds by the act of writing the checks or having the checks written, and that Joyce Covatto aided and abetted the fraudulent scheme. In light of the fact that Mr. Covatto freely admitted that he took the funds at issue--for the proper purpose of collecting accrued compensation which was owed to him--the government's case rested solely on the issue of whether the funds were illegally taken; the elements of the crimes charged did not require any showing as to the motive for taking the funds, the use of the funds, or the manner in which the funds were dispersed subse-

quent to the alleged misapplication. As was stated in United States v. Ruse, 112 F. Supp. 667 (W.D. Pa. 1953), with regard to the requirements of proof in a prosecution under § 656:

> The counts relating to abstraction of funds of the National Bank allege a specified amount, and charge an unlawful and wilful conversion to the use of defendant. What defendant did with said funds is immaterial. The alleged offense was completed when the abstractions occurred.

Ruse, 112 F. Supp. at 668 (emphasis added). Thus, any evidence pertaining to the motive for taking, or the use of, the funds allegedly misappropriated by Covatto was clearly immaterial and irrelevant to the issues before the jury.

To prevent the admission of irrelevant matters, the Covattos made a motion in limine to the trial court for a ruling which would

exclude any reference to transactions between Mr. Covatto and third parties arising from the checks which were the subject of the indictment. This motion was denied. Thereafter, the prosecution introduced many hours of testimony and other evidence to support the allegation that the Covattos had used some of the money to bribe an influential employee at Marine Midland Bank so as to continue their contracts with the bank, and had given money to a member of the board of directors for services which were not rendered. Such evidence was unfairly prejudicial to the Covattos, for it permitted the jury to convict the Covattos, not out of a belief that Mr. Covatto was not entitled to the funds, but instead because of a dislike for what was done with the money. The jury's verdict demonstrates the effect that this

testimony had on their thinking, in that it lead them to an inconsistent result. Mr. Covatto was acquitted with regard to the checks payable to himself, and convicted on counts involving checks payable to third persons. Thus, it is obvious that the government's use of unrelated evidence of bribery--with which he was not charged--improperly influenced the jury. Particularly in view of the fact that the government's theory on all of these counts was that Mr. Covatto was not entitled to take any of the checks, it is plain that the jury convicted not on this basis but rather on the basis of the use of each check.

The case law plainly supports Petitioner's position on this issue; while this Honorable Court has not addressed the issue, a number of other courts have held that evi-

dence pertaining to the use of funds allegedly taken in violation of 18 U.S.C. § 656 is unfairly prejudicial or immaterial. See Ruse, 112 F. Supp. 667; Havener v. United States, 15 F.2d 503 (8th Cir. 1926); Matters v. United States, 244 F. 736 (8th Cir. 1917); Sheridan v. United States, 236 F. 305 (9th Cir. 1916), cert. denied, 243 U.S. 638 (1917); Breese v. United States, 106 F. 680 (4th Cir.), rev'd on other grounds, 108 F. 804 (4th Cir. 1901).

More particularly, in Matters, the Eighth Circuit determined on very similar facts that, where detailed evidence of the fraudulent uses of funds allegedly taken in violation of § 656 was highly prejudicial, it could not be admitted even if it could be said to be relevant to the question of the intent to misapply funds. The Matters court

found that the primary effect of the evidence was to emphasize for the jury the prejudicial nature of conduct which was not the subject of the criminal prosecution, and thus concluded that the introduction of the evidence, despite its arguable relevance regarding intent, prevented a fair trial for the defendant.

The short opinion of the Third Circuit in this case gave no indication of why it believed that Matters was not controlling. Without citing any case law, and without discussing Matters except to note that the Covattos cited the case in their briefs, the court offered no basis for distinguishing the Eighth Circuit's ruling. In fact, the court's brief reference to the Matters decision erroneously stated that the Covattos were relying on it as support for the pro-

position that evidence of the use made of the funds was irrelevant to the charges. As was plainly argued in the Covattos' briefs to the Third Circuit, however, the Matters case demonstrates that even evidence arguably probative of intent can be so prejudicial, particularly if presented in a manner which gives it undue emphasis, as to deny a fair trial in a prosecution under § 656. The Third Circuit's summary treatment of an issue which was so crucial to the fairness of the Covattos' trial does not inspire confidence that a careful review of the evidence and the case law was undertaken. Moreover, the Third Circuit's position on this issue puts it in direct conflict with the ruling of the Eighth Circuit in Matters, and the Fourth and Ninth Circuits, as cited above, and thus the ruling of this Court is necessary to resolve a con-

flict among the courts of appeals.

## III. THE GOVERNMENT PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT THE PETITIONERS VIOLATED 18 U.S.C. § 656 AND 1344.

The cursory treatment of the arguments of the Covattos in the decision of the Court of Appeals is particularly evident in the court's discussion of the sufficiency of the evidence. Essentially, the court merely recited the elements of the offenses under 18 U.S.C. §§ 656 and 1344 and listed 13 items of testimony pertaining to all of the charges against the Covattos, and then concluded that the evidence, while circumstantial, was sufficient to support the convictions.

The Court of Appeals' simplistic approach ignored important legal issues which were crucial to the resolution of the question of the guilt or innocence of the Covat-

tos. For example, with regard to the charges that funds were misappropriated for child care benefits for Joyce Covatto, the Court completely failed to discuss the significance of the fact that under Pennsylvania law Alfred Covatto, as CEO of NBC, was entitled to set employee salaries and benefits both prior to and after the purchase of NBC by FUNB. The opinion does not discuss the fact that the child care was approved by the directors of NBC and issued long before the sale of NBC, in precisely the same manner as after the sale, thus negating any possible inference of impropriety from the manner in which the benefit was handled.

The opinion further fails to address the fact that a Pennsylvania court, applying state law which defines for federal courts in Pennsylvania the duties and rights of the

parties on issues of corporate powers, has explicitly ruled in a civil suit between Alfred Covatto and FUNB that Covatto had the inherent authority to authorize benefits, such as the provision of child care. The Court of Common Pleas of Erie County, Pennsylvania ruled on November 9, 1988, that Covatto had the authority to take actions which were not specifically endorsed by the board of directors. In rejecting FUNB's claim that Covatto had no power to execute a lease agreement for the use of an automobile without notifying, and seeking approval from, the board of directors, the court stated in pertinent part:

> Covatto's position as an employee of the newly acquired entity substantially parallels that of his executive status at the original National Bancorporation. The duties and powers exercised in each of the two employment situations involved substantial control over

> ordinary and everyday business operations to the point that ultimate decisions concerning everyday business were within Covatto's control. . . .
>
> Covatto himself could, therefore, execute any function that was within the lawful power of the board of directors subject only to the "ordinary course of business" standard. See, Renault v. L.N. Renault and Sons, 188 F.2d 317 (3d Cir. 1951). . . .
>
> The fact that Covatto was given almost unrestrained control over [t]his [sic] facet of the entire business operation by the Board of Directors from the moment of the acquisition of [NBC] by [FUNB] further requires the legal result that he must have assumed any and all powers with which the Board could have endowed him.

National Bancorporation and First United National Bank v. Covatto, No. 670-A-1986, slip op. at 4-5 (C.P. Erie Cty., Nov. 9, 1988) (emphasis added) (A-29-31).

This Court has previously noted that federal courts should give deference to the

interpretations of state courts with regard to issues of state law which control the legal relationships of parties in federal courts. See McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984). In this case, however, the Court of Appeals not only failed to give deference to the state court ruling as to the inherent power of Alfred Covatto in his position as CEO of NBC after its sale to FUNB, it completely ignored it.

Clearly, the Pennsylvania court's judgment should control on the legal issue of the authority of Covatto to act in the area of employee benefits. The Pennsylvania court's judgment is particularly meaningful in the case at hand, in which the child care benefit was provided to a valued employee who, without the benefit, would have been unable to continue in her employment. Particularly

since the Court of Appeals did not even acknowledge the Pennsylvania court's ruling, this Court must exercise its jurisdiction to ensure that proper deference is given to state court interpretations of state law issues.

With regard to the counts relating to the checks drawn against NBC accounts by Alfred Covatto, because Covatto was acquitted on a number of counts dealing with the same type of transaction as those for which he was convicted, the jury verdict shows an inexplicable inconsistency which requires close scrutiny of the reasonableness of the convictions. As discussed above, the government's theory on each of the counts involving the checks was that Covatto was not entitled to any of the funds in question, and could not have reasonably believed that he was so en-

titled. Covatto, on the other hand, presented a defense which demonstrated that at the time of the buy-out, he was owed $48,000 in accrued compensation, and the subsequent withdrawals of funds which were the subjects of these charges were legitimate payments against his accrued compensation. Because Covatto was acquitted on four of the counts, the jury obviously concluded that the requisite intent to defraud was lacking with regard to at least some of these checks. A review of the facts introduced at trial shows that the jury was correct with regard to the counts on which they acquitted Covatto, and that the evidence compelled a verdict of not guilty on the remaining counts as well.

No witness at trial controverted the fact that, at the time of the buy-out, Covatto was owed $48,000 in accrued compensation

by NBC as a result of the fact that he had not taken his full salary for the previous two years. This $48,000 liability of NBC was reflected on the books at the time of the sale and was recognized by all parties to the transaction. Shortly after the sale, Covatto was paid only $10,000 of this $48,000, despite the fact that under the sale agreement he was entitled to full payment at the time of closing. It was also uncontroverted that Richard Dowling, the CEO of FUNB, told Covatto at that time that as more funds became available, he could take the balance due of $38,000. The government's theory on how the taking of this accrued compensation became criminal centered on statements made by Covatto at a FUNB board meeting in April of 1984, when he stated that he was willing to postpone his taking of the funds until pro-

fitability of NBC was stronger. Significantly, the government produced no evidence of any consideration provided to Covatto for this offer, for none was given. Moreover, it was clearly established at trial that the board took no action with regard to this unilateral offer of Covatto. Therefore, the government's position boils down to a claim that Covatto's taking of the checks as payment against the $38,000 owed to him by NBC was illegal because it was contrary to an offer made by Covatto--unilaterally and with no action taken on it by the FUNB board--to forego his $38,000 until such time as the board saw fit to pay him.

Plain common sense and reasonableness mandates the rejection of the claim that Covatto would voluntarily give up his right to $38,000 in such a business deal, and the

record is devoid of any substantial evidence which would support this claim. Moreover, elementary principles of contract and corporation law compel the conclusion that Covatto's offer to postpone the collection of his accrued compensation--whatever form it took--had no bearing on his legal right to such payments in light of the fact that he received no consideration for the offer and the board of directors took no action with regard to it. See Channel Home Centers, Division of Grace Retail Corp. v. Grossman, 795 F.2d 291 (3d Cir. 1986) (test for enforceability of agreement is whether both parties have manifested intention to be bound by its terms, whether terms are sufficiently definite to be specifically enforced, and whether there is consideration on both sides).

In fact, the record shows that Covatto

had no intention of permanently foregoing his right to the $38,000, for stipulated evidence at trial demonstrated that on the day after the board meeting in question, Covatto submitted a personal financial statement to the Comptroller of Currency which listed the $38,000 as accrued compensation. In addition, numerous witnesses testified that the withdrawal of the offer to postpone receipt of the funds was made publicly to Richard Dowling on May 30, 1984, after a FUNB shareholders' meeting at which provisions of the buy-out agreement regarding elections of directors were disregarded.

The remainder of the government's evidence on these charges consisted of testimony regarding what Covatto did with the funds as he took them. However, this prejudicial evidence was erroneously admitted and irrele-

vant (see Section II, supra). Again, the allegations against Covatto required proof of the fraudulent intent to take money to which he was not entitled. What became of the money could have no relevance to whether the money was lawfully taken, and any testimony regarding such disbursements could not be considered substantial evidence of fraudulent intent. See Matters, 244 F. at 739.

By overwhelming the jury with irrelevant and prejudicial evidence regarding the uses to which the funds taken by Covatto were put, the government clearly confused the actual issue on these charges, and, not surprisingly, the jury's verdict is plain evidence of this confusion. By finding Covatto innocent of fraudulent intent with regard to several counts, the jury clearly and indisputably found that Covatto believed that he was en-

titled to the funds. Since this was the crucial issue on all the counts, the convictions on the remaining counts cannot be reconciled. While it is generally true that inconsistent jury verdicts may not be set aside simply on the basis of the inconsistency, United States v. Powell, 469 U.S. 57 (1984), this does not preclude a reviewing court from inquiring into the reasons or bases for the inconsistency, and where it is apparent that a jury's inconsistent guilty verdicts rest on insubstantial evidence, the reviewing court has the obligation to set them aside. Id. at 67.

Finally, with regard to the allegedly false invoices, the government's evidence was particularly weak in that it consisted primarily of testimony that the Covattos had failed to produce written documentation for

the work reflected in the invoices to prove that the invoices were valid. Thus, in essence, the Covattos were called upon to prove their innocence, a perversion of the rule that the government bears the burden of proof in any criminal proceeding. Taylor v. United States, 436 U.S. 478 (1978).

To support its conclusion that the evidence was sufficient to show fraud with regard to the invoices, the Court of Appeals relied on evidence that Alfred Covatto told an investigator that he could supply the documentation for the invoices but did not do so. However, this fact was wholly insufficient to create any inference of fraud because of the circumstances surrounding the maintenance of the records and the inability of the Covattos to gain access to the necessary documentation. Moreover, the prosecu-

tion witnesses contradicted themselves and each other in relating various stories concerning when, and about what invoices, questions were asked, and thus the claims about what the Covattos' promised cannot be said to constitute substantial evidence of fraudulent intent.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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